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In the Supreme Court of the United States

OCTOBER TERM, 1975

MARIO ORTIZ SERVANTES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing approximately 366 pounds of marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to a term of three years' imprisonment to be followed by a special parole term of three years. The court of appeals affirmed *per curiam* (Pet. App.).

The evidence showed that a vehicle driven by petitioner was stopped at a fixed immigration checkpoint near Falfurrias, Texas, on May 30, 1973. While questioning the occupants of the vehicle as to their citizenship,[1] a Border Patrol officer detected the odor of marihuana and asked petitioner to open the trunk of the vehicle. Petitioner opened the trunk, exposing the marihuana that he was convicted of possessing.

Petitioner contends that this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which invalidated a warrantless "roving patrol" search of an automobile for concealed aliens, conducted without probable cause to believe that the vehicle contained aliens—should be applied retroactively to invalidate the search of his vehicle by the Border Patrol officers at a fixed immigration checkpoint. The search of petitioner's vehicle, however, occurred after the officer had detected the odor of marihuana. The search was therefore based on probable cause to believe that the vehicle contained contraband (*United States* v. *Blackstock*, 451 F. 2d 908, 910 (C.A. 9)), and the principles enunciated in *Almeida-Sanchez* are not applicable here.

In any event, this Court held in *Bowen* v. *United States*, No. 73-6848, decided June 30, 1975, that *Almeida-Sanchez* should not be applied retroactively

[1] Petitioner's co-defendant Cindy Lou Bates was a passenger in the vehicle when it was stopped. She was also charged with illegal possession of marihuana and was tried jointly with petitioner. The jury was unable to reach a verdict as to Bates, and a mistrial was declared as to her.

to require the suppression of evidence seized pursuant to a search of a vehicle at a fixed immigration checkpoint. Since the search of petitioner's vehicle occurred prior to the date of the *Almeida-Sanchez* decision, the court of appeals properly affirmed petitioner's conviction on the authority of *Bowen* (Pet. App. 8).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

[2] Petitioner does not challenge the validity of the initial stop of his vehicle at the checkpoint. In *United States* v. *Martinez-Fuerte*, No. 74-1560, certiorari granted, October 6, 1975, we argue that routine warrantless stops of vehicles at fixed immigration checkpoints, for the purpose of inquiring into the occupants' citizenship and right to be in this country, are reasonable under Fourth Amendment standards. That issue is also presented in *Sifuentes* v. *United States*, No. 75-5387, certiorari granted, November 11, 1975. Both cases involve post-*Almeida-Sanchez* stops. Even if the Court were to decide that such routine stops are unlawful, the decision would not affect the disposition of petitioner's case. From the Court's decision in *Bowen*, holding that the principles of *Almeida-Sanchez* should not be applied retroactively to invalidate *searches* at a fixed checkpoint, it follows *a fortiori* that the validity of the initial stop at a checkpoint, conducted prior to the decision in *Almeida-Sanchez*, is likewise unaffected.

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